STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 22, 2013
v	No. 310156 Wayne Circuit Court
HENRY GEORGE BROWN, Defendant-Appellant.	LC No. 10-008214-FC

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant under MCL 769.10, to 356 months to 75 years for the assault with intent to commit murder conviction, three to seven years and six months for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

I. HEARSAY

Defendant first argues that the trial court erred in permitting (1) Tony George's testimony that the victim, Shirley Ann Smith (Shirley), told George that defendant shot her and (2) Officer Tyrone Gray's testimony that Shirley told Gray that defendant shot her. Defendant objected to both statements on the basis of hearsay, but the trial court ruled that the hearsay was admissible either as an excited utterance or as a dying declaration. Defendant's claims fail.

A trial court's decision whether to admit or exclude evidence will be affirmed in the absence of a clear abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). The trial court abuses its discretion when its decision is outside the range of principled outcomes. *Id*. This Court reviews de novo the trial court's rulings on preliminary questions of law regarding the admissibility of evidence, such as the application of a statute or rule of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless it comes within an exception to the rule against it. MRE 802. One exception to the rule against hearsay is an excited utterance, defined as: "A

statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). The pertinent inquiry regarding admissibility "is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate." *People v McLaughlin*, 258 Mich App 635, 659-600; 672 NW2d 860 (2003). The trial court is accorded wide discretion in determining whether the declarant was still under the stress of the event at the time the statement was made. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998).

A dying declaration may be admitted as an exception to the hearsay rule "if the declarant is unavailable as a witness and the statement was made 'while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.'" *People v Stamper*, 480 Mich 1, 3-4; 742 NW2d 607 (2007), quoting MRE 804(b)(2). Under this exception, a court may admit as substantive evidence hearsay statements concerning the cause or circumstances of the declarant's impending death if the surrounding circumstances clearly establish that the declarant was *in extremis* and believed that his death was imminent. *Id.* at 4.

The trial court did not abuse its discretion in ruling that Shirley's statement to George was admissible as an excited utterance. George testified that defendant told him that Shirley was "down there dying" and that "you better go save her[.]" George ran to the Maxwell Street home, where the shooting occurred, and saw that Shirley was bleeding from her chest and leg. Shirley was gasping for air and was lightheaded. Shirley told George that "he shot me in the chest;" George knew that "he" referred to defendant given George's prior conversation with defendant. Shirley was still under the stress of the event, i.e., she was lying on a mattress and bleeding as a result of multiple gunshot wounds. The statement also was related to the startling event, the shooting. Given the circumstances of the shooting, it is reasonable to conclude that Shirley was so overwhelmed that she lacked the capacity to fabricate. See *Smith*, 456 Mich at 552. Thus, the trial court did not abuse its discretion admitting Shirley's statement as an excited utterance. *Id*.; *King*, 297 Mich App at 472.

In addition, the trial court did abuse its discretion in ruling that Shirley's statement to George was also admissible as a dying declaration. Defendant argues that Shirley's statement was not within the dying declaration exception because Shirley did not die; she was not in life threatening danger, and she failed to testify at trial. But Shirley was "unavailable as a witness" under MRE 804(a)(5) because the prosecution showed due diligence in its attempts to locate her to testify at the trial. Moreover, Shirley need not have actually died for her statement to be admissible as a dying declaration; she must only have believed death was imminent when she made the statement. MRE 804(b)(2); *People v Orr*, 275 Mich App 587, 595-596; 739 NW2d 385 (2007). It is reasonable to conclude that Shirley believed her death was imminent because of the seriousness of her injuries, her difficulty breathing, and because the statement concerned the cause of what Shirley believed to be her impending death.

For many of the same reasons as above, the trial court did not abuse its discretion in ruling that Shirley's statement to Officer Gray was admissible as an excited utterance under MRE 803(2). Officer Gray found Shirley lying on a mattress with a gunshot wound to her chest and two gunshot wounds to her lower leg. Officer Gray testified that Shirley was sighing, crying, and appeared to be in great pain. Shirley told Officer Gray, "I was shot by Henry Brown;

please, sir, I don't want to die; Henry shot me." Shirley was patently under the stress of being shot, and her statement related to that event. Therefore, Shirley's statement to Officer Gray was properly admitted as an excited utterance under MRE 803(2). Moreover, Shirley's excited utterance was admissible whether or not she was available as a witness. *Id.*; *People v Creith*, 151 Mich App 217, 223; 390 NW2d 234 (1986).

II. CONFRONTATION CLAUSE

Defendant next argues that the admission of Shirley's out-of-court statements to George, Officer Gray, and Officer Calvin Washington violated defendant's right of confrontation. We disagree with defendant with respect to Shirley's statements to George and Officer Gray. Although defendant's right of confrontation was violated with respect to the admission of Shirley's statement to Officer Washington, the error does not warrant reversal.

Defendant did not object at trial to the admission of the three statements on Confrontation Clause grounds. Instead, defendant objected to Shirley's statements to George and Officer Gray as hearsay. But an objection on the basis of hearsay does not preserve for appellate review a challenge that the testimony violated the Confrontation Clause. MRE 103(a)(1); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Therefore, the issue is unpreserved.

The constitutional question whether a defendant was denied her constitutional right to confront witnesses against her is reviewed de novo. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). However, this Court reviews unpreserved claims of error for plain error affecting defendant's substantial rights. *Coy*, 258 Mich App at 12. To warrant reversal, there must be: (1) an error; (2) which was plain, clear or obvious; and (3) affected substantial rights, i.e., the error affected the outcome of the proceedings. *Id*. Furthermore, reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of guilt or innocence. *Id*.

In every criminal trial, the federal and state constitutions protect the defendant's right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). A statement is testimonial if "the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Dendel*, 289 Mich App 445, 453; 797 NW2d 645 (2010). On the other hand, "statements are not testimonial 'when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id*. at 454, quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Thus, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause." *Michigan v Bryant*, __ US __, __; 131 S Ct 1143, 1155; 179 L Ed 2d 93 (2011). Whether the primary purpose of an interrogation is to enable police assistance to meet

an ongoing emergency is an objective inquiry. *Id*. at 1156. "That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id*.

A conversation begun to determine the need for emergency assistance can evolve into an interrogation eliciting testimonial statements. *Id*. at 1159. This evolution may occur after the emergency ends or what is initially believed to be an emergency is determined not to be. *Id*. In general, a person's statements describing what is presently occurring to resolve the existing situation are not testimonial, but statements simply describing past events that are unnecessary to resolve a present emergency are testimonial. *Id*. at 1154-1155.

A. SHIRLEY'S STATEMENT TO GEORGE

Shirley's statement to George, a private citizen, was not made to police or investigative authorities or under circumstances that would lead an objective witness to reasonably believe that the statement would be available for later use at trial. See *Dendel*, 289 Mich App at 453. Accordingly, Shirley's statement to George did not implicate defendant's right of confrontation.

B. SHIRLEY'S STATEMENT TO OFFICER GRAY

Shirley's statement to Officer Gray was not testimonial because the primary purpose of the interrogation was to respond to an ongoing emergency. As in *Bryant*, the police responded to a radio dispatch that a shooting occurred at the Maxwell Street home. The officers entered the home and saw Shirley lying on a mattress suffering from gunshot wounds to her chest and leg. Shirley was sighing, crying, and in great pain. Shirley told the first officers to enter the home, "I was shot by Henry Brown; please, sir, I don't want to die; Henry shot me." The objective circumstances show that the police and Shirley were addressing an ongoing emergency when she made her statement to Gray. *Bryant*, 131 S Ct at 1157 n 8. The threat from the shooter had not ended because neither the reason for shooting nor the shooter's location was known. *Id*. at 1159, 1163-1164. Thus, the objective circumstances indicate that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. Shirley's statement to Officer Gray was not testimonial and did not implicate defendant's right of confrontation.

C. SHIRLEY'S STATEMENT TO OFFICER WASHINGTON

Shirley's statement to Officer Washington was testimonial, and its admission into evidence violated defendant's right of confrontation. Unlike Shirley's statement to Officer Gray at the scene of the shooting, Shirley's subsequent statement to Officer Washington was made during an interview at the hospital the day after the shooting occurred. Shirley's statement was testimonial because she spoke of a past event, and the primary purpose of the interrogation was not to respond to an ongoing emergency. See *Bryant*, 131 S Ct at 1154-1155. Thus, Shirley "should reasonably have expected the statement to be used in a prosecutorial manner," and "the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." See *Dendel*, 289 Mich App at 453.

Nonetheless, defendant failed to show that the plain error affected his substantial rights, i.e., that the error affected the outcome of the lower court proceedings. *Coy*, 258 Mich App at 12. Defendant merely argues that the error was not harmless because it negatively affected his right to confront his accuser. The evidence of defendant's guilt, however, was overwhelming. George testified that as he was exiting his vehicle, he saw defendant entering a yellow cab. Defendant stopped and told George, "[Y]ou better -- she down there dying; you better go save her; you probably could save that b----; she probably dead, so." George asked defendant who he was talking about and defendant replied, "Ree-Ree," which was a nickname for Shirley. George found Shirley lying on a mattress bleeding from her chest and leg. Shirley told George, "[H]e shot me in the chest." Given defendant's statement to George, it was clear to George that Shirley was referring to defendant.

Officer Gray and Officer Johnson responded to the scene and saw that Shirley sustained gunshot wounds to her chest and leg. Shirley told Officer Gray, "I was shot by Henry Brown; please, sir, I don't want to die; Henry shot me." After the officers returned to the scene of the shooting, the officers noticed a yellow cab that was headed towards to the scene. Based on the information from George, the officers conducted an investigatory stop of the cab. When the officers ordered defendant and the driver out of the vehicle, defendant yelled, "F--- that b----; she going to get out by eight o'clock; what the Judge going to do, give her some blow? That b---- ain't testifying. This s--- is a joke." The officers recovered a hotel key from defendant. Weldon, the driver, testified that he picked up a fare at the Travel Lodge.

Pursuant to a search warrant executed at the Travel Lodge, the officers recovered a registration form that listed defendant's home as his grandmother's address. A subsequent search warrant was executed at defendant's grandmother's home where defendant's grandmother and another woman were present. The two women indicated that defendant stayed upstairs; the officers searched the upstairs bedroom and found men's clothing and a .45 caliber semi-automatic handgun in a dresser drawer. The gun recovered in the dresser drawer matched the four .45 caliber cartridge cases and two bullets found at the scene of the shooting. Thus, given the substantial evidence of defendant's guilt, defendant has failed to show that the admission of Shirley's statement to Officer Washington contrary to defendant's right of confrontation affected the outcome of the trial. *Coy*, 258 Mich App at 12.

III. SUFFICIENCY OF EVIDENCE

Defendant contends the prosecution failed to present sufficient evidence from which a rational trier of fact could conclude that an assault with intent to commit murder occurred, and he was the individual who shot Shirley. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court reviews the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that all essential elements of the crime were proved beyond a reasonable doubt. *Id*. at 196.

"The elements of assault with intent to commit murder are '(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *Id*. 195-196., quoting *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). In addition,

identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The elements of a crime may be proved with circumstantial evidence and reasonable inferences from the evidence. *Ericksen*, 288 Mich App at 196. This includes the actor's intent, which, because of the difficulty of proving a state of mind, is sufficiently satisfied with minimal circumstantial evidence. *Id*. at 197; *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010).

A rational trier of fact could conclude that the prosecution proved the elements of assault with intent to commit murder beyond a reasonable doubt. Ample circumstantial evidence existed to infer that defendant was the person who shot Shirley. Defendant told George, "[Y]ou better -- she down there dying; you better go save her; you probably could save that b----; she probably dead, so." George asked defendant whom he was talking about, and defendant replied, "Ree-Ree," which was a nickname for Shirley. Shirley told George and Officer Gray that defendant shot her. Moreover, upon defendant's arrest, defendant yelled, "F--- that b----; she going to get out by eight o'clock; what the Judge going to do, give her some blow? That b---- ain't testifying. This s--- is a joke." Then, pursuant to a valid search warrant, the police recovered a handgun in defendant's grandmother's home in a room with men's clothing that matched the gun that fired the shell casings and fired bullets found at the scene of the shooting.

Defendant's argument that there was insufficient evidence because the prosecution did not prove motive is misguided. Motive is not an essential element of any crime. *People v Waterstone*, 296 Mich App 121, 173; 818 NW2d 432 (2012). Moreover, defendant presents no evidence to substantiate his claim that witnesses testified falsely. This Court will not interfere with the jury's role in assessing the credibility of the witnesses and resolving conflicting testimony. *Harverson*, 291 Mich App at 179; *Ericksen*, 288 Mich App at 196. Therefore, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found all the essential elements of assault with intent to commit murder were proved beyond a reasonable doubt and convicted defendant of committing that crime.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant failed to preserve his claims of ineffective assistance of counsel by moving the trial court for a new trial or seeking an evidentiary hearing. Therefore, review is limited to errors apparent on the record. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011).

Whether a defendant was denied his constitutional right to the effective assistance of counsel presents a question of law reviewed de novo on appeal. *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012). To establish a claim for ineffective assistance of counsel, a defendant must prove that his counsel's representation fell below an objective standard of reasonableness and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 669, citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

Defendant first argues his trial counsel was ineffective because he failed to both investigate potential witnesses and to call those witnesses at trial. Decisions regarding what

evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Failure to call a witness or present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. Defendant's claim is unfounded because there is nothing apparent on the record that indicates the name of defendant's purported witnesses and the detail of their potential testimony. Consequently, defendant cannot establish that he suffered any prejudice as a result of counsel's alleged failings. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Likewise, defendant argues that defense counsel did not raise the issue of Shirley's absence from the proceedings during the trial, but there is nothing apparent on the record that indicates that raising this issue would have benefitted defendant. Even so, defense counsel, at the demand of defendant at a pretrial hearing, requested that the trial court investigate Shirley and the alleged use of a fake name that was given to the police. Defense counsel cross-examined the prosecution's witnesses and argued in his closing argument that the witnesses were not credible. In addition, defense counsel objected to George's and Officer Gray's testimony that Shirley told each that defendant shot her and argued that the statements were inadmissible hearsay. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190; *Davis*, 250 Mich App at 368. Under these standards, defendant has failed to establish his claim of ineffective assistance of counsel.

In addition, defendant argues that defense counsel failed to discuss trial strategy with him. Although an attorney has a duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments," *Strickland*, 466 US at 688, nothing apparent on the record substantiates defendant's claim that defense counsel did not consult with defendant regarding "important decisions." See *Armisted*, 295 Mich App at 46.

Moreover, defendant claims that defense counsel should have objected to the admission of Shirley's hearsay statements on the basis his constitutional right of confrontation. But as explained above, the admission of George's and Officer Gray's testimony regarding Shirley's statements did not violate defendant's right of confrontation. Defense counsel does not render ineffective assistance by failing to raise futile objections. *Ericksen*, 288 Mich App at 201. As for Shirley's statement to Officer Washington that defendant shot her, which violated defendant's right of confrontation, we have already concluded in Part II(C) that this error did not affect the outcome of the trial. Therefore, defendant cannot establish the prejudice prong of his claim of ineffective assistance of counsel. *Vaughn*, 491 Mich at 669; 674.

V. SENTENCING

Defendant concedes that his sentence for his assault with intent to commit murder conviction is within the sentencing guidelines range of 171 months to 356 months. Nonetheless, defendant argues that the sentence is cruel and unusual under the federal constitution and cruel or

unusual under the Michigan Constitution, considering that defendant was 49 years old when he was sentenced. Defendant's claim fails.

The United States Constitution provides that "cruel and unusual punishment" shall not be inflicted. US Const, Am VIII. The Michigan Constitution provides that "cruel or unusual punishment shall not be inflicted." Const 1963, art 1, § 16. A proportionate sentence is one that adequately reflects the seriousness of the defendant's conduct and the seriousness of his criminal history. *People v Smith*, 482 Mich 292, 324; 754 NW2d 284 (2008). A sentence that is within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel and/or unusual punishment under either the federal or Michigan constitutions. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A defendant's age is insufficient to overcome the presumptive proportionality of a sentence that is established on the basis of the defendant's criminal record and the gravity of the offense. *People v Bowling*, 299 Mich App 552, 558-559; 830 NW2d 800 (2013).

Defendant's sentence for his assault with intent to commit murder conviction is not cruel and/or unusual. Defendant's sentence was within the guidelines recommended range that is determined on the basis of the characteristics of offense and the offender's criminal history. The sentence was therefore presumptively proportionate and also presumptively not cruel and/or unusual punishment. *Smith*, 482 Mich at 324; *Powell*, 278 Mich App at 323. Defendant's age is insufficient to overcome the presumptive proportionality of his sentence. *Bowling*, 299 Mich App at 558-559. Defendant's prior convictions include second-degree murder, manslaughter, two convictions for domestic violence, and a misdemeanor conviction for domestic violence. Defendant's extensive criminal history and the brutal nature of his current offenses justify the sentence imposed, and we conclude that defendant has failed to demonstrate that his sentence was cruel and/or unusual punishment.

We affirm.

/s/ /William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan